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No. 01-175

IN THE

Supreme Court of the United States

SPENCER WILLIAMS, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

INTEREST OF THE *AMICUS CURIAE*..... 1

STATEMENT..... 2

REASONS FOR GRANTING THE PETITION..... 4

I. SEVERAL PAY-SETTING STATUTES HAVE FAILED TO INSULATE FEDERAL JUDICIAL SALARIES FROM THE POLITICS OF CONGRESSIONAL PAY..... 4

A. The Postal Revenue and Federal Salary Act of 1967..... 5

B. The Executive Salary Cost-Of-Living Adjustment Act of 1975..... 6

C. The Ethics Reform Act of 1989..... 8

II. DIMINUTION OF JUDICIAL COMPENSATION OVER THE PAST THIRTY YEARS HAS BEEN SIGNIFICANT..... 9

III. WHILE JUDICIAL COMPENSATION HAS DIMINISHED, JUDICIAL WORKLOADS HAVE INCREASED..... 11

IV. JUDICIAL PAY EROSION UNDERMINES THE GUARANTEES OF LIFETIME TENURE AND UNDIMINISHED SALARY THAT WERE DESIGNED TO SAFEGUARD JUDICIAL INDEPENDENCE..... 13

CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases: Page

INS v. Chadha, 462 U.S. 919 (1983) 7

United States v. Hatter, 121 S. Ct. 1782 (2001) 3, 4

United States v. Will, 449 U.S. 200 (1980) 2, 3, 6, 7

Statutes:

Pub. L. No. 97-92 (1981) 7

2 U.S.C. §§ 351-61 (2000) 5

2 U.S.C. § 352 (2000) 8

2 U.S.C. § 359(2)(A) (2000) 6

2 U.S.C. § 359(4)(A) (2000) 6

2 U.S.C. § 362(3)(A) (2000) 6

5 U.S.C. App. 4 (2000) 8

5 U.S.C. § 501(a-b) (2000) 8

5 U.S.C. § 502 (2000) 8

5 U.S.C. § 5302(2) (2000) 8

5 U.S.C. §§ 5302(2) (2000) 8

5 U.S.C. §§ 5305-06 (2000) 6

5 U.S.C. § 5318 (2000) 8

5 U.S.C. § 5318, note (2000) 8

28 U.S.C. § 375 (2000) 8

Rules:

Fed. R. Civ. P. 23 12

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

TABLE OF AUTHORITIES—*(Continued)*

Legislative History: Page

Bipartisan Task Force on Ethics, 101st Cong., Rep. on H.R. 3660, Government Ethics Reform Act of 1989 (1989), *reprinted in*, 135 Cong. Rec. H9253 (daily ed. Nov. 21, 1989) 7, 8

Managing Human Capital in the Twenty-First Century: Hearing Before the Subcom. on Gov't Management, Restructuring, & the Dist. of Columbia, Senate Comm. on Governmental Affairs, 106th Cong., 2d sess. (Mar. 9, 2000) 14

Other Authorities:

2000 Year-End Report on the Federal Judiciary (U.S. Jan. 1, 2001) ..... *passim*

ABA Policy & Procedures Handbook (ABA 2000) 1

Admin. Off. of U.S. Courts, *News Release* (Mar. 14, 2001) 9

"The AmLaw 100," 23 Am. Lawyer, Pull-Out Table (Jul. 2001) 10

"The AmLaw 200," 22 Am. Lawyer, Table (Aug. 2000) 11

"Bechtle to Step Down From Bench," 224 Leg. Intelligencer 1 (Am. Lawyer Jun. 4, 2001) 13, 14

Federal Judicial Pay Erosion: A Report on the Need for Reform (ABA/FBA Feb. 2001) ..... *passim*

"Federal Judicial Salaries: A Gamble with the Future" (Corp. Comm. for Fair Comp. of the Fed. Judiciary 1985) 14

Alexander Hamilton, James Madison & John Jay, *The Federalist*, No. 78 (Bantam Books 1982) 13, 15

Alexander Hamilton, James Madison & John Jay, *The Federalist*, No. 79 (Bantam Books 1982) 4, 11, 15

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

http://www.uscourts.gov/vacancies/judgevacancy.htm..... 14

http://www.uscourts.gov/vacancies/summary.html..... 5

Manual for Complex Litigation 3d (Fed. Jud. Ctr. 1995).. 12

Bill McAllister, *"The Judiciary's 'Quiet Crisis': Prestige Doesn't Pay the Tuition,"* Wash. Post, A19 (Jan. 21, 1987) 10

Promises Made, Promises Still Unkept: Restoration of Inflation-Induced Salary Cuts for Top Gov't Officials 1986-87 (1986) 7, 13

2 *Records of the Federal Convention of 1787* (Farrand rev. ed. 1937) 13

Reference Manual on Scientific Evidence 2d (Fed. Jud. Ctr. 2000) 12

Statistical Rep. for Justices & Judges of the United States (Jun. 1, 2001) 5

U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Fairness for Our Public Servants* (1988) 9

U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Report* (1986).....7, 11

U.S. Const., Art. III, § 1 ..... *passim*

"What Lawyers Earn: NLJ's Annual Report," 23 Nat'l L.J. A25-27, 31 (Oct. 2, 2000) 11

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The ABA, with more than 400,000 members, is the leading national membership organization of the legal profession.[1] In serving "the public and the profession by promoting justice, professional excellence and respect for the law," the ABA is guided by the following important goals, among others: (1) "to promote improvements in the American system of justice"; (2) "to advance the rule of law"; and (3) "to preserve the independence of the. . .judiciary as fundamental to a free society." *ABA Policy & Procedures Handbook,* at 2 (ABA 2000).[2]

As the principal voice of the American legal profession, the ABA has the expertise — and obligation — to address the issues presented by this case, and has already done so independently of the litigants. Twelve ABA policy statements since 1963 have consistently supported increased judicial pay. With the Federal Bar Association ("FBA"), the ABA has studied the phenomenon of "pay erosion" within the federal judiciary, which is at the core of this case. The results of the ABA/FBA study, released in February, 2001, and discussed herein, demonstrate the seriousness of this problem, and thus the importance of this case, apart from the immediate interests of any of the litigants.

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1. The ABA certifies that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Supreme Court Rule 37.2(a). The ABA also certifies that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amicus curiae,* its members, and its counsel, has made any monetary contribution to the preparation or submission of this brief. Supreme Court Rule 37.6

2. Neither this brief, nor the decision to file it, should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions herein. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Thus, the ABA's participation as *amicus curiae* will assist the Court in understanding the profound impact of continuing erosion of the compensation of federal judges — particularly since the judiciary has been adversely affected by denial of cost-of-living adjustments ("COLAs") that are guaranteed by statute to almost all other government employees.

STATEMENT

Petitioners (plaintiffs below) are sitting or former federal judges, both active and senior status, who filed suit after Congress blocked COLAs to their salaries for four of five years, 1995-7 and 1999. Under the applicable statutory scheme, "once a determination was made by Congress in a given year that a COLA would be paid to federal employees on the General Schedule, a COLA became payable to federal judges." (Pet. App. 3a) (citation omitted). Congress, however, "passed separate laws. . .that expressly barred the payment of the COLAs to federal judges." (Pet. App. 4a) (citations omitted).

The district court ruled for petitioners. It held that special legislation denying statutorily mandated COLAs to federal judges violated Article III, section 1 of the United States Constitution, which bars Congress from diminishing the compensation of the federal judiciary. (Pet. App. 103-31a).

A divided court of appeals reversed. (Pet. App. 1-99a). The majority held that, under the "vesting" rule of *United States v. Will*, 449 U.S. 200 (1980), as long as Congress acts before an otherwise automatic pay increase goes into effect, it can block any number of consecutive, statutorily-mandated judicial COLAs. (Pet. App. 23-26a). The dissent concluded that under *Will*, Congress created a vested Article III obligation by mandating automatic cost-of-living adjustments for all federal employees, and that Article III precluded the *ex post facto* alteration of that mandate to the detriment of the judiciary. (Pet. App. 70-72a). The majority and the dissent thus

follow dramatically different interpretations of the *Will* decision. Only this Court can decide which of these interpretations is correct.[3]

Diminution of judicial pay has rightly been called the most pressing issue now facing the federal judiciary. The drafters of Article III were well aware of inflation, knew that inflation could render penurious what was once satisfactory compensation, and permitted upward adjustments in judicial pay. In 1989, Congress did just that, but its upward adjustments were retroactively blocked by later Congresses.

For over thirty years, Congress has grappled with the issue of judicial compensation, trying several different approaches — but these all linked Article III-protected judicial pay with pay for members of Congress (and other senior officials), who lack such constitutional protection. This linkage has been a persistent and fatal flaw, permitting the political pressures affecting congressional pay to wreak havoc with the pay of federal judges. The result has been continuous and substantial reduction in the purchasing power of judicial salaries.

Judicial compensation is at a level of inadequacy that threatens to impair the quality and independence of the federal judiciary. As the real value of judicial pay has eroded, the incomes of top-notch private-sector attorneys have risen dramatically. This disparity impairs the ability of the judiciary to retain experienced judges and to attract the kind of highly qualified candidates essential to maintain the historically high standards of the federal bench. Thus, for both legal and jurisprudential reasons, this Court should grant *certiorari*.

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3. After the Court of Appeals decision at issue here was rendered, this Court addressed the constitutionality under the Compensation Clause of certain Medicare and Social Security taxes. *United States v. Hatter*, 121 S. Ct. 1782 (2001). *Hatter* held that, although the Compensation Clause prohibits taxation that singles out judges for specially unfavorable treatment, it does not forbid Congress from enacting a law imposing a nondiscriminatory tax upon judges and other citizens. *Id.* at 1791-92. Applying that standard, this Court found the Social Security taxes, but not the Medicare taxes, unconstitutional. *Id.* at 1793.

REASONS FOR GRANTING THE PETITION

I. SEVERAL PAY-SETTING STATUTES HAVE FAILED TO INSULATE FEDERAL JUDICIAL SALARIES FROM THE POLITICS OF CONGRESSIONAL PAY.

Continuing erosion of judicial pay is "the most pressing issue facing the Judiciary." *2000 Year-End Report on the Federal Judiciary,* at 1 (U.S. Jan. 1, 2001) (*"2000 Year-End Report"*). As detailed in the recent American Bar Association/Federal Bar Association report, *Federal Judicial Pay Erosion: A Report on the Need for Reform* (ABA/FBA Feb. 2001) (*"Judicial Pay Erosion"*) (available online at <http://www.abanet.org/poladv/fedjudreport.pdf> (visited Sep. 6, 2001), this process has been going on for over thirty years. Combined with increased private sector lawyer compensation, the *de facto* reduction in judicial compensation threatens to impair the ability of the federal judiciary to attract and retain judges of the highest caliber.

The authors of Article III prohibited diminution of judicial pay, but not future increases, knowing full well the ravages of inflation — that "fluctuations in the value of money" precluded fixed judicial compensation because, over a life tenure of several decades, "a stipend, which would be very sufficient at their first appointment, [could] become too small in the progress of their service." Alexander Hamilton, James Madison & John Jay, *The Federalist,* No. 79, at 400-01 (Bantam Books 1982). *See generally United States v. Hatter,* 121 S. Ct. 1782, 1790-91 (2001); *Judicial Pay Erosion,* at 4.

Thus, this Court recently held that the Constitution forbids diminution of judicial salaries — including "indirect" diminution:

> [T]he Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay. . . . Otherwise a legislature could circumvent even the most basic Compensation Clause protection by. . .precisely but indirectly achiev[ing] the forbidden effect.

Hatter, 121 S. Ct. at 1791 (citation omitted).

There are currently approximately 1,300 active and senior judges in the Article III judiciary.[4] They depend upon Congress to avoid having their compensation reduced by inflation. But for thirty years federal pay-setting procedures have failed to operate, to the point of jeopardizing the continued independence of the judicial branch.

The crux of the problem is congressionally-imposed linkage of judicial salaries protected by Article III with other salaries — particularly those of members of Congress — that do not enjoy such constitutional protection. Thus, federal judges have borne the consequences of the political reluctance of Congress to increase its own pay, or even to accept previously mandated COLAs.

The last thirty years have seen Congress create and discard several procedures for adjusting judicial compensation. Throughout, however, Congress has injected the politically contentious issue of its own compensation into this mix.

A. *The Postal Revenue and Federal Salary Act of 1967*

Top-level salaries in all three branches of government were first linked in 1969. Salary parity was proposed by the initial Commission on Executive, Legislative and Judicial Salaries ("Quadrennial Commission"), created by the Federal Salary Act of 1967.[5] The Quadrennial Commission, comprised of private sector members appointed by the President, the leaders of the Senate and House of Representatives, and the Chief Justice, was to meet every four years and examine salaries of the judiciary, members of Congress, and senior executive branch personnel both *inter se* and in relation to the General Schedule that sets the salaries for most federal employees. Its recommendations were reviewed by the President, who then submitted them to Congress. Congress was required to vote

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4. Of the 858 Article III judicial positions, 840 are in the District Courts and Courts of Appeals. <http://www.uscourts.gov/vacancies/summary.html> (visited Aug. 17, 2001). There are also 458 senior Article III judges. *Statistical Rep. for Justices & Judges of the United States* (Jun. 1, 2001).

5. Pub. L. No. 90-206 § 225, 81 Stat. 613, 642 (1967) (codified as amended at 2 U.S.C. §§ 351-61 (2000)).

on the President's salary proposal within 60 days. *See Will,* 449 U.S. at 203 (describing Salary Act); *Judicial Pay Erosion,* at 4-5.

The Quadrennial Commission system was an attempt to insulate Congress from the politically explosive issue of increasing its own pay. Necessary salary adjustments would be recommended by the Quadrennial Commission and adjusted to political realities by the President. By placing the initial recommendation in the hands of an independent commission, and by involving the President, Congress hoped to minimize the political consequences of accepting pay raises for itself.

In the beginning, the process worked as intended. In 1969, Congress adopted the Quadrennial Commission's proposal to adjust all three branches' salaries for several years of inflation. Judicial pay increased by $10,000 a year for district judges and by $9,500 a year for circuit judges. *Judicial Pay Erosion,* at 5. For eight years thereafter, neither the judiciary nor other covered officials received any salary adjustment. *2000 Year-End Report,* at 4.

B. The Executive Salary Cost-Of-Living Adjustment Act of 1975

Prolonged stasis on compensation issues led Congress to try again with the Executive Salary Cost-Of-Living Adjustment Act of 1975.[6] The intent of this statute was to provide the judiciary, members of Congress, and senior executive branch personnel with the same COLAs that rank-and-file federal employees received. *2000 Year-End Report,* at 5. These COLAs were subject to congressional veto, 2 U.S.C. § 359(2)(A) & (4)(A) (2000), and were to be in addition to salary increases granted through the Quadrennial Commission review process.

The Adjustment Act failed because Congress statutorily linked its own members' COLAs with those received by Article III judges and other covered persons. 2 U.S.C. § 362(3)(A) (2000). For political reasons, Congress frequently vetoed or reduced the annual cost-of-living adjustments

6. Pub. L. No. 94-82, 89 Stat. 419 (1975) (codified at 5 U.S.C. §§ 5305-06 (2000)).

provided under the Adjustment Act — decisions that applied equally to judges and other persons covered by the Act.

Under the Adjustment Act, Congress allowed one five percent COLA in 1975, but then blocked four consecutive COLAs in 1976-79, which together would have increased judicial (and congressional) salaries by some 28 percent. *Will,* 449 U.S. at 205-08. Several judges brought suit seeking restoration of the four COLAs. In *Will,* the Court struck down revocation of two of the COLAs as unconstitutional diminutions of salary under Article III because the raises had already "vested" before Congress had acted, while upholding the other two denials because they took effect before the beginning of the fiscal year to which the COLAs pertained. *Will,* 449 U.S. at 224-29.[7]

After *Will,* between 1982 and 1985, the federal judiciary (and other covered persons) received annual COLAs of between 3½ percent and 4 percent. U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Report (1986), reprinted in, Promises Made, Promises Still Unkept: Restoration of Inflation-Induced Salary Cuts for Top Gov't Officials 1986-87,* at 112-14 (1986) (*"Promises Still Unkept"*). Congress reduced the Quadrennial Commission's salary recommendations in 1986 and rejected all of the recommendations of the 1988 Commission. *Judicial Pay Erosion,* at 6.[8] Thus, Congress acted on only three of seven Quadrennial Commission reports. *Bipartisan Task Force on Ethics, 101st Cong., Rep. on H.R. 3660, Government Ethics Reform Act of 1989* (1989), *reprinted in,* 135 Cong. Rec. H9253, H9264 (daily ed. Nov. 21, 1989) (*"Report on H.R. 3660"*); *2000 Year-End Report,* at 4.[9]

7. *Will* restored judicial COLAs for 1976 and 1979. 449 U.S. at 225-26, 229-30.

8. The Quadrennial Commission would not have met in 1986, except that the 1984 Commission was devoted to the implications of *INS v. Chadha,* 462 U.S. 919 (1983), which invalidated a legislative veto indistinguishable from that in the Salary Act. *See Judicial Pay Erosion,* at 6 n.21.

9. In 1981, Congress passed a continuing resolution, Pub. L. No. 97-92, that included a provision requiring specific congressional action before judges received any COLA. The court below held that this section expired in accordance with its terms in 1982, and is of no current relevance. (Pet. App. 8-11a).

C. The Ethics Reform Act of 1989

The 1975 legislation "only reopened to political gamesmanship what was intended to be a more objective and automatic cost-of-living adjustment." *Report on H.R. 3660,* 135 Cong. Rec. H9264. Concern over recruitment and retention of senior judicial and executive branch personnel prompted Congress to change the compensation-setting process once again in 1989. Congress passed the Ethics Reform Act,[10] which adopted many of the 1988 Quadrennial Commission recommendations and replaced the Commission with a "Citizens Commission."[11] It also revised the mechanism for determining COLAs for the judiciary, members of Congress and senior executive branch personnel.

The Ethics Reform Act sets COLAs for covered officials, which include judges and members of Congress, using the Employment Cost Index ("ECI")[12] – up to an annual maximum of five percent. 5 U.S.C. §§ 5302(2), 5318, note (2000). Congress intended the ECI mechanism to provide regular COLAs for covered officials and thereby prevent the need for periodic major "catch-up" adjustments of the sort enacted in 1989. *Judicial Pay Erosion,* at 7.

Beyond mandating COLAs, the Ethics Reform Act also limited the amount of outside income that federal judges and members of Congress could earn from writing, barred acceptance of honoraria, and imposed mandatory workload requirements on senior judges. 5 U.S.C. App. 4 §§ 501(a-b), 502; 28 U.S.C. § 375 (2000).

The scheme of the Ethics Reform Act has been no more successful than its predecessors at halting erosion of judicial

10. Pub. L. No. 101-194, 103 Stat. 1716 (1989). This Act is codified in various titles, most notably at 5 U.S.C. § 5318 (2000).

11. The new commission was to have five members selected from the public at large and six members appointed by the heads of the three branches of government, 2 U.S.C. § 352 (2000), but it has never met. *2000 Year-End Report,* at 6. As a result, there has been no overall review of federal judicial salaries since the 1988 report of the now-abolished Quadrennial Commission. *Judicial Pay Erosion,* at 7.

12. The ECI is a quarterly Bureau of Labor Statistics index measuring changes in wages and salaries paid to private sector employees. 5 U.S.C. § 5302(2) (2000).

salaries. Although the limits upon outside judicial income remain, Congress allowed the ostensibly automatic annual COLAs for the judiciary (and itself) only in 1991-93, 1998, and 2000-01 (Pet. App. 8a); *Judicial Pay Erosion,* at 7. Thus on March 14, 2001, the Judicial Conference of the United States voted to seek yet another "catch up" adjustment for federal judges, this time of 9.6 percent.[13] Congress has permitted only three cost-of-living adjustments since 1993 – in 1998 (2.3 percent), 2000 (3.4 percent), and 2001 (2.7 percent). *2000 Year-End Report,* at 5-6.

II. DIMINUTION OF JUDICIAL COMPENSATION OVER THE PAST THIRTY YEARS HAS BEEN SIGNIFICANT.

Thirty years of failed efforts to regularize review of judicial compensation have produced an absolute decline in the present value of judicial salaries and an even steeper relative decline in compensation compared to the peer group of successful attorneys from which the federal judiciary is drawn. In 1988, the Quadrennial Commission cautioned that these trends "diminish the quality of justice in this country by dissuading the best and the brightest. . .from service on the Federal bench." U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Fairness for Our Public Servants,* at 27 (1988).

The sporadic salary increases the judiciary has received have not kept pace with inflation. From 1969 to 2000, the purchasing power of a federal district judge's pay has declined by almost a quarter (24.6 percent) – when measured against the Consumer Price Index ("CPI").[14] Erosion of judicial salaries is even more significant when measured against "big ticket" expenses that federal judges typically face, such as housing (up 30.5 percent during the same period) and their children's college tuition (up 111.3 percent).[15]

13. *See* Admin. Off. of U.S. Courts, *News Release* (Mar. 14, 2001) (available at <http://www.uscourts.gov/Press_Releases/jc301.pdf.> (visited Aug. 17, 2001)).

14. *Judicial Pay Erosion,* at 9, Chart A. This chart (1a), and others from the same report, are found in the Appendix attached to this brief.

15. College tuition has been a frequently cited reason for federal judges

Moreover, the 24.6 percent diminution in judicial salaries as of 2000 understates the degree to which the federal judiciary's compensation has declined over the past thirty years. Between 1974 and 1989, when inflation was worse, the diminution was even greater — between 25.6 percent (1974) and 33.8 percent (1989) in real terms. *Judicial Pay Erosion,* at 10 & Chart C (2a). Salary trends further demonstrate diminution of federal judicial salaries. Between 1969 and 1999, the pay of district judges increased 253.1 percent — well below the overall CPI increase of 363 percent. The judiciary's decline in purchasing power compares with an average 420.6 percent increase in private sector wages during the same period of time. *Id.,* at 11, Chart D (3a).

Diminution of judicial compensation is even more dramatic when compared to income in the legal profession — the constituency from which federal judges are drawn. *2000 Year-End Report,* at 6-7. The value of rendering public service in a highly visible and respected role has its own intrinsic rewards, but those rewards are not inexhaustible. Marked disparity between judicial pay and private salaries for lawyers reduces the pool of highly qualified judicial candidates and makes it more difficult to retain experienced jurists.

The disparity between salaries of federal judges and those of their peers in private practice has reached a dangerous level. Experienced private-sector attorneys are perhaps the best reference point in terms of comparable knowledge and "value" to their employers. Such salaries provide a stark contrast. In 2000, partners at the largest national law firms were paid on average well in excess of $500,000. *Id.* at 7.[16] The average partner draw at the next tier of large firms (*American*

NOTES *(Continued)*

returning to more lucrative private practice. Bill McAllister, *"The Judiciary's 'Quiet Crisis': Prestige Doesn't Pay the Tuition,"* Wash. Post, at A19 (Jan. 21, 1987).

16. In 2000, average annual partner compensation at the 100 largest American law firms ranked by *The American Lawyer* in terms of gross revenue ranged from $3,195,000 to $225,000. Averaging these 100 firm averages yields a nationwide average annual partner compensation of $722,050 for these firms. *See "The AmLaw 100,"* 23 Am. Lawyer, at Pull-Out Table (Jul. 2001).

Lawyer "Second 100") in 1999 was approximately $363,000.[17] The current salaries of federal district ($145,100) and appellate ($153,900) judges are thus a fraction — often a small fraction — of what these judges could earn in private practice. *2000 Year-End Report,* at 6.

Indeed, starting annual associate salaries at major law firms routinely exceed $100,000. *"What Lawyers Earn: NLJ's Annual Report,"* 23 Nat'l L.J. A25-27 (Oct. 2, 2000). Major metropolitan law firms, including those in Washington, DC, often pay first-year lawyers $125,000 a year. *Id.* Several major firms in 2000 offered new recruits salary and bonus packages that paid them more than the federal district or circuit court judges for whom many of them clerked, *2000 Year-End Report,* at 6-7 — and these judges were all highly experienced lawyers before joining the bench.[18] The financial sacrifice that judges make to serve on the federal bench is growing ever greater, as is the corresponding lure of alternative private employment for federal judges who find themselves financially strapped.

Thus, the Founding Fathers' fears are proving prescient. Alexander Hamilton's worry, when Article III was being considered, that inflation could make judicial pay "penurious and inadequate" has been coming to pass over the last thirty years. *The Federalist,* No. 79, at 400. This erosion of judicial compensation "breaches faith with the Constitution." U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Report, reprinted in, Promises Still Unkept,* at 189.

III. WHILE JUDICIAL COMPENSATION HAS DIMINISHED, JUDICIAL WORKLOADS HAVE INCREASED.

As judicial salaries have eroded, the quantity and complexity of federal caseloads has burgeoned. The per-capita caseload of federal district judges has increased dramatically

17. *See "The AmLaw 200,"* 22 Am. Lawyer, at Table (Aug. 2000). The calculation is the same as described in the previous footnote.

18. Federal judges also lag significantly behind peers in academe. *See "What Lawyers Earn,"* 23 Nat'l L.J. at A31 (surveying law school dean salaries).

since 1969. In 1969, there were 110,778 new filings in the federal court system. *Judicial Pay Erosion,* at 13. In 2000 there were almost three times as many filings — 322,262. *2000 Year-End Report,* at 10-11 & n.7. Creation of additional federal judgeships has not kept pace. Average per capita district court caseloads increased by 55.2 percent over the same period, from 339 to 526 per judge. *Judicial Pay Erosion,* at 14, Chart E (4a).

The courts of appeals have experienced an even greater workload increase. Appellate filings escalated five-fold, from 10,709 in 1969 to 54,697 in 2000. *Id.* at 14; *2000 Year-End Report,* at 10. The per-judge caseload of the circuit courts has grown 195 percent — from 123 cases in 1969 to 363 in 1999. *Judicial Pay Erosion,* at 14, Chart F (5a).[19]

Not only are there more active cases, but the nature of those cases has become progressively more complex since 1969 — particularly with new federal statutory causes of action such as RICO, CERCLA, and ERISA, liberalization of class action requirements under Fed. R. Civ. P. 23, and tightened judicial scrutiny of expert witnesses. The greater complexity of the federal caseload is reflected in the publications of the Federal Judicial Center. *E.g., Reference Manual on Scientific Evidence 2d* (Fed. Jud. Ctr. 2000); *Manual for Complex Litigation 3d* (Fed. Jud. Ctr. 1995).

Federal courts have been increasingly called upon to resolve many of the major legal, political, and social disputes of our time. Rapid developments in intellectual property, medical science, internet commerce, and the globalization of both the economy and criminal ventures are spawning novel and complicated disputes "many of which straddle the intersections of law, technology, and the physical, biological and social sciences." *2000 Year-End Report,* at 15. These cases require greater intellectual prowess and procedural creativity from the judiciary. But as the jobs of federal judges require more and more, they are being paid less and less.

19. The caseload explosion would be worse but for efforts of senior judges, who carry substantial caseloads even after retiring from active status. In 1999, almost 15 percent of federal appeals and almost 20 percent of federal trials were before senior judges. *Judicial Pay Erosion,* at 15.

IV. JUDICIAL PAY EROSION UNDERMINES THE GUARANTEES OF LIFETIME TENURE AND UNDIMINISHED SALARY THAT WERE DESIGNED TO SAFEGUARD JUDICIAL INDEPENDENCE.

The drafters of Article III knew that substantial compensation was necessary to attract and keep persons "of the first talents" as federal judges. 2 *Records of the Federal Convention of 1787,* at 429 (Farrand rev. ed. 1937) (remarks of General Pinkney). They knew the difficulty of inducing those with "sufficient skill in the laws to qualify them for the stations of judges" to "quit[] a lucrative line of practice to accept a seat on the bench." *The Federalist,* No. 78, at 399. Commitment to lifetime public service is necessarily diminished by financial pressures that deter many candidates from seeking appointment to the federal bench and that cause sitting judges to resign from the bench to enter private practice.

Not surprisingly, members of the federal judiciary are increasingly deciding to leave the bench. The Eastern District of Pennsylvania, for example, has lost three members to private practice in recent years, including a plaintiff in this litigation.[20] During the 1990s, fifty-four Article III judges resigned or retired from the federal bench. *2000 Year-End Report,* at 6. There were forty-one retirements in the 1980s, twenty-four in the 1970s, and only three during the 1960s. *Id.; Promises Still Unkept,* at 48. In the 1970s and 1980s, there were more judicial resignations "than at any time in the history of the nation," and 75 percent of the resigning judges offered "inadequate compensation" or "better offers" in the private sector as the reason. *Promises Still Unkept,* at 48-49 (footnotes omitted). The crisis only accelerated over the past decade. The 1990s saw more than forty percent of all retirements from the federal bench since 1965. *Judicial Pay Erosion,* at 15.

Early departure from the bench imposes substantial tangible and intangible costs upon the judiciary. When an experi-

20. *"Bechtle to Step Down From Bench,"* 224 Leg. Intelligencer 1, 8 (Am. Lawyer Jun. 4, 2001).

enced federal judge retires or resigns, his or her caseload must be assumed by other judges of the same court until such time as the resulting vacancy is filled — a process that at minimum takes months and, increasingly, can take years. *See* <http://www.uscourts.gov/vacancies/judgevacancy.htm> (visited Aug. 17, 2000) (duration of current vacancies). Moreover, when an experienced judge leaves, the judiciary loses the valuable skills and insights of the departing jurist, something not quickly or easily replaced.[21] New appointees rarely ascend the bench with the range of capabilities and background that years of judicial experience provide. "It takes five years for a qualified attorney to reach peak efficiency as a Federal judge." "*Federal Judicial Salaries: A Gamble with the Future,*" at 1 (Corp. Comm. for Fair Comp. of the Fed. Judiciary 1985) (quoting former Chief Justice Warren Burger).

Diminution of judicial compensation further affects anyone considering whether to accept judicial appointment. This impact upon recruitment is perhaps the most disturbing of all, since it narrows *ab initio* the talent pool from which the federal judiciary is drawn. Inadequate judicial salaries disadvantage the judiciary in the "war for talent." Those responsible for recruiting and reviewing judicial candidates report this problem as the single most important factor discouraging potential candidates from seeking judicial appointment.[22]

Most candidates for the bench earn, or have the potential to earn, much more than the salary of a federal judge. Qualified candidates who lack independent wealth are perfectly capable of meeting current and anticipated financial obligations by reason of their earning capacity, but not if that earning capacity is artificially and substantially limited by inadequate judicial pay. The federal judiciary is enriched by diverse backgrounds of all sorts — including financial status.

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21. Judge Bechtle, for example, was a member of the Judicial Panel on Multi-District Litigation, and specialized in administration of mass tort litigation. *Bechtle to Step Down*, 224 Leg. Intelligencer at 8.

22. *Managing Human Capital in the Twenty-First Century: Hearing Before the Subcom. on Gov't Management, Restructuring, & the Dist. of Columbia, Senate Comm. on Governmental Affairs*, 106th Cong., 2d sess., at 18 (Mar. 9, 2000) (remarks of Sen. Durbin); *Judicial Pay Erosion*, at 17.

The diminution in judicial compensation reduces socio-economic pluralism by increasingly closing the federal bench to those without significant sources of unearned income. "We cannot afford a Judiciary made up primarily of the wealthy." *2000 Year-End Report*, at 3.

The Constitution of the United States ensures the independence of the judiciary by granting federal judges lifetime tenure upon good behavior and by prohibiting diminution of judicial compensation. *U.S. Const.*, Art. III, § 1; *see The Federalist*, No. 79, at 400 ("[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support"); *2000 Year-End Report*, at 2 (these provisions are "key to the independence of the federal Judiciary"). As discussed above, this litigation presents important questions relating to the continued viability of these guarantees.

This Court should decide whether Article III's guarantee of undiminished judicial compensation can be undermined by special legislation denying COLAs to federal judges. Erosion of judicial salaries has demonstrably impaired the corresponding guarantee of lifetime judicial tenure — "the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws." *The Federalist*, No. 78, at 393.

CONCLUSION

This Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX

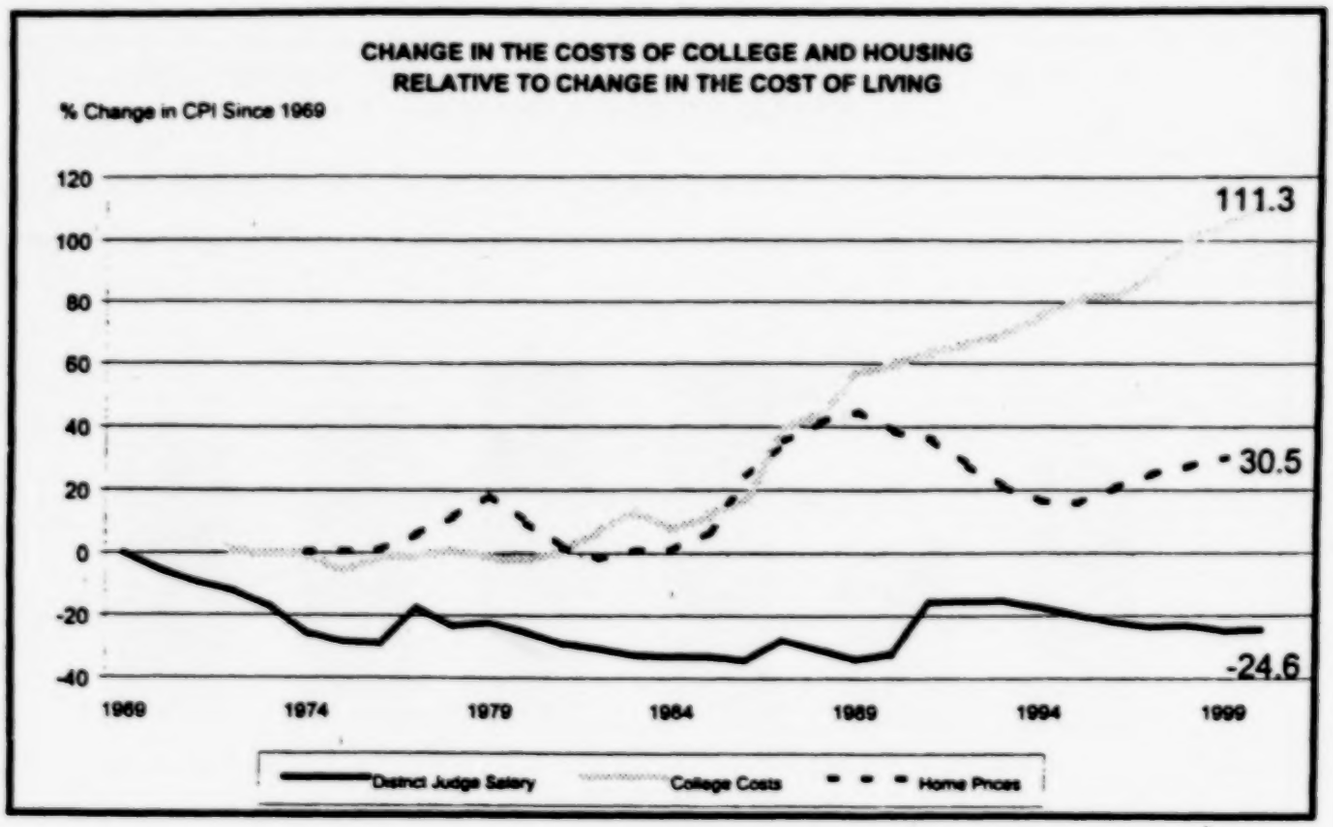

CHANGE IN THE COSTS OF COLLEGE AND HOUSING
RELATIVE TO CHANGE IN THE COST OF LIVING
% Change in CPI Since 1969
120
100
80
60
40
20
0
-20
-40
111.3
30.5
-24.6
1969
1974
1979
1984
1989
1994
1999
District Judge Salary
College Costs
Home Prices

CHART A

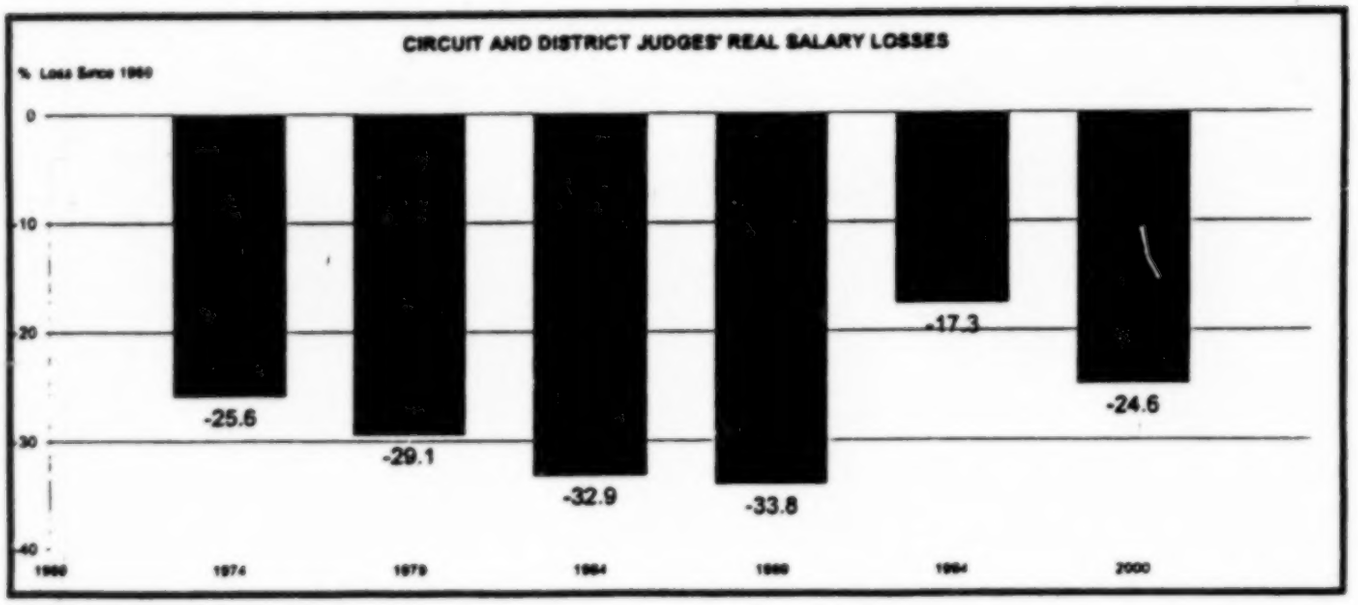
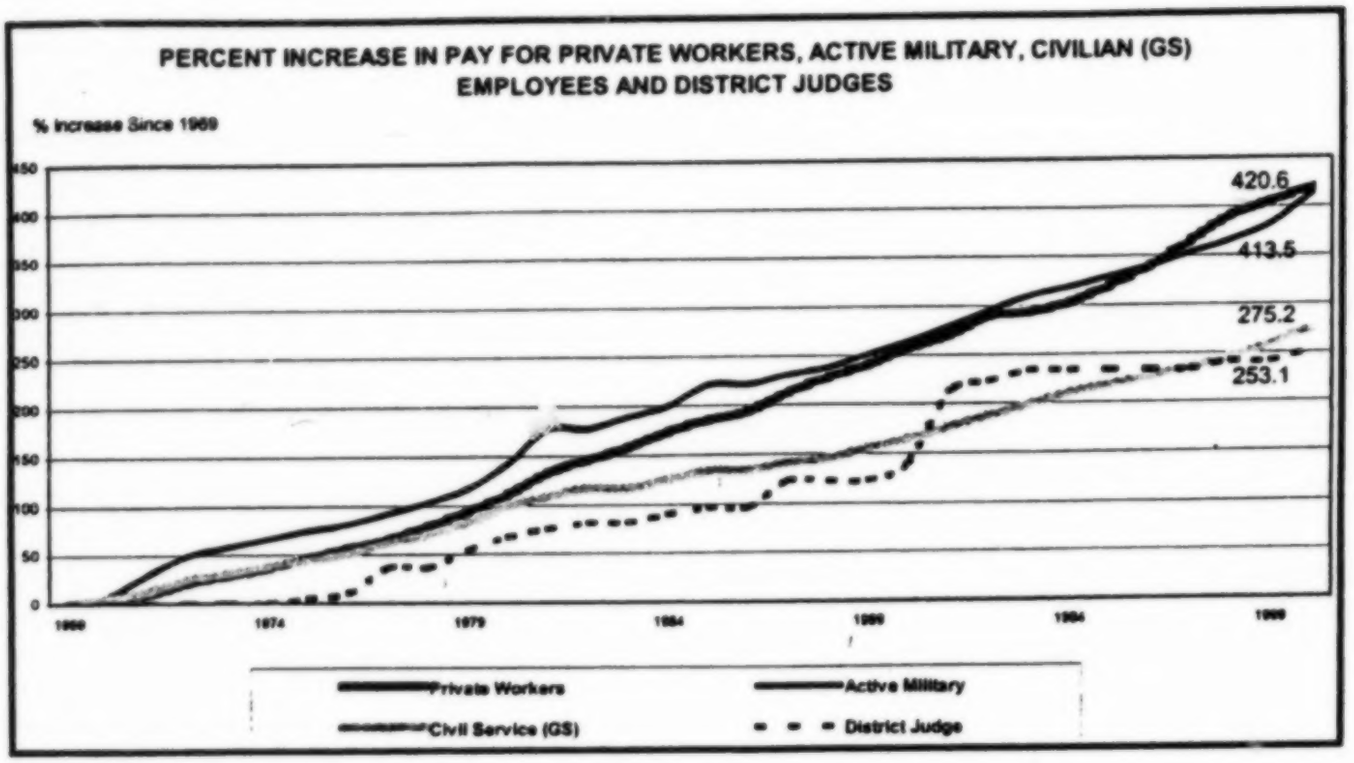


CHART C



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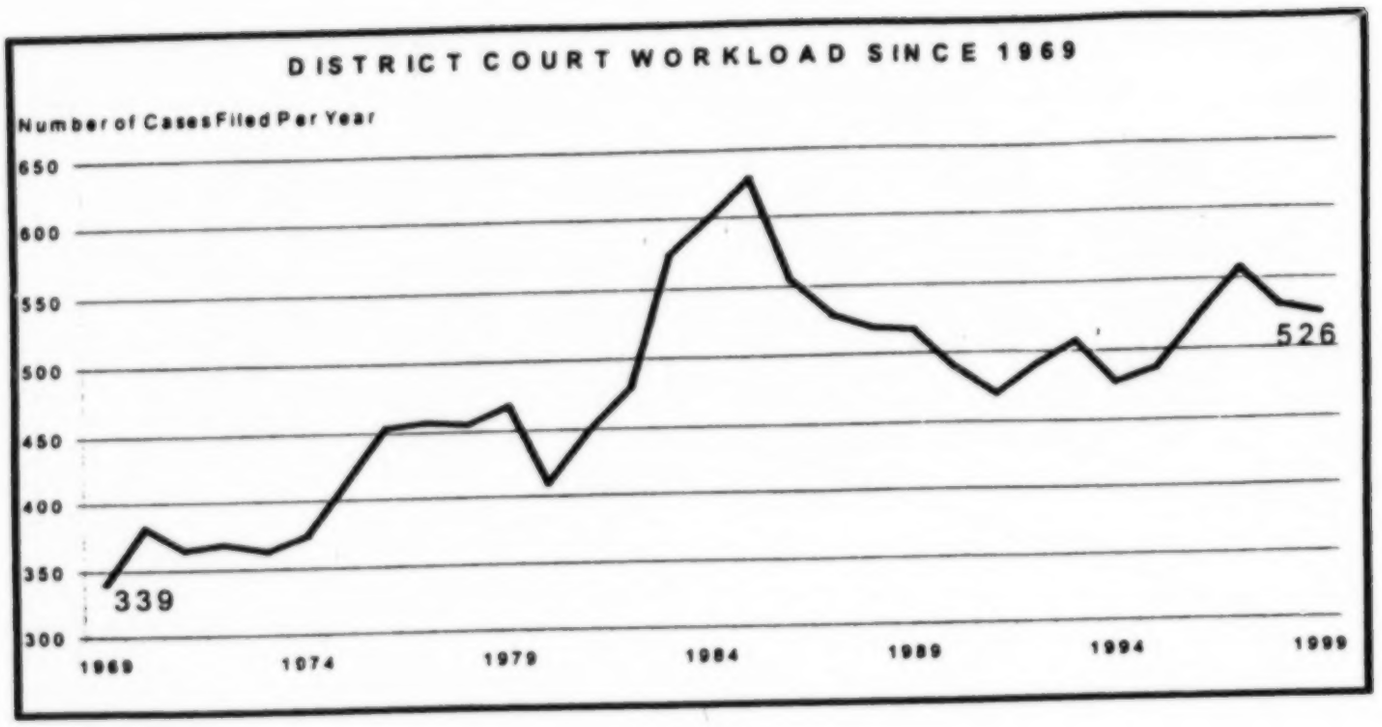

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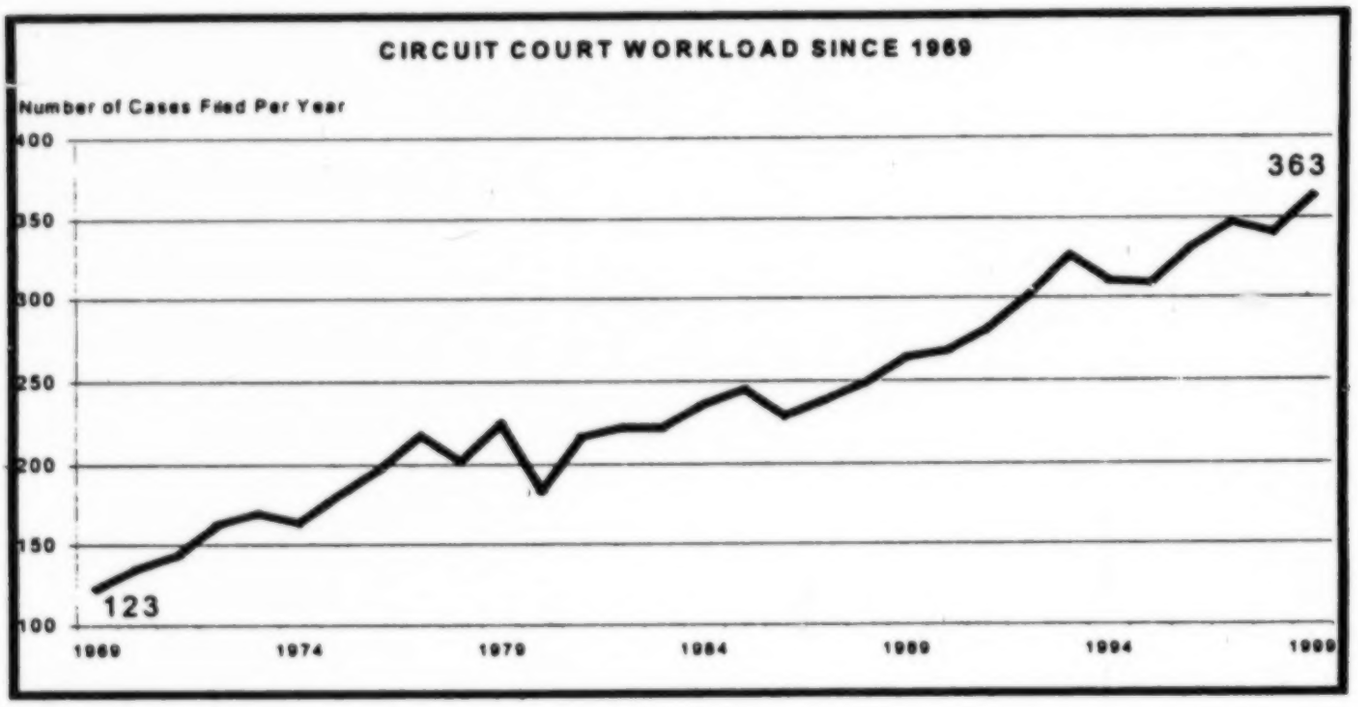

CHART F